

TENNESSEE GENERAL ASSEMBLY  
FISCAL REVIEW COMMITTEE



FISCAL NOTE

HB 1432 - SB 1459

January 6, 2016

**SUMMARY OF BILL:** Specifies that aggravated sexual battery is a lesser included offense of rape of a child and aggravated rape of a child.

**ESTIMATED FISCAL IMPACT:**

**NOT SIGNIFICANT**

Assumptions:

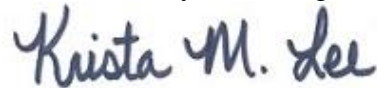
- In 1999, the Tennessee Supreme Court established a three-prong test for determining whether an offense is a lesser included offense. *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999).
- Ten years later, the General Assembly enacted Chapter 408 of the 2009 Tennessee Public Acts ("Public Chapter 408"), which codified a test for determining when an offense is a lesser included offense. Public Chapter 408 added two new subsections to Tenn. Code Ann. § 40-18-110. Subsection (f) adopted two prongs of the three-prong *Burns* test, and subsection (g) specifically listed certain lesser included offenses. The lesser included offenses listed in subsection (g) were intended to clarify what was current practice. *See, Hearing on S.B. 783*, 106<sup>th</sup> General Assembly, Senate Sess. (Tenn. June 8, 2009).
- A recent case heard by the Tennessee Criminal Court of Appeals addressed whether aggravated sexual battery was a lesser included offense of rape of a child. *State v. John J. Ortega, Jr.*, No. M2014-01042-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 295, (Tenn. Crim. App. Apr. 23, 2015).
- The Criminal Court of Appeals reviewed the procedural history of *Burns* and Public Chapter 408. *Id.* at 21-24. The court noted that aggravated sexual battery would be a lesser included offense of rape of a child under the *Burns* test, *Id.* at 22, but was not a lesser included offense under Public Chapter 408, *Id.* at 34-35. Public Chapter 408 did not adopt the prong of the *Burns* test that would make aggravated sexual battery a lesser included of rape of a child. *Id.* at 22-24.
- Subsection (g) specifically provides that aggravated sexual battery is a lesser included offense of aggravated rape, but does not mention rape of a child. Tenn. Code Ann. § 40-18-110(g)(3).
- The proposed legislation specifically makes aggravated sexual battery a lesser included offense of rape of a child by adding "rape of a child" to § 40-18-110(g)(3).

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- The Court of Criminal Appeals also noted that since the enactment of Public Chapter 408 the court had upheld seven convictions for aggravated sexual battery as a lesser included offense of either rape of a child or aggravated rape of child. *Ortega*, 2015 Tenn. Crim. App. LEXIS 295, at 30 n.5. Those cases, however, did not directly raise the issue that aggravated sexual battery was not a lesser included offense of rape of a child. *Id.*
- Though aggravated sexual battery is not a lesser included offense of rape of a child or aggravated rape of a child, current practice up to the time of the *Ortega* case had prosecuted aggravated sexual battery as a lesser included offense of rape of a child and aggravated rape of a child. It is assumed that codifying this practice in § 40-18-110(g)(3), as the proposed legislation seeks to do, will not significantly impact incarceration costs.

### **CERTIFICATION:**

The information contained herein is true and correct to the best of my knowledge.

A handwritten signature in blue ink that reads "Krista M. Lee". The signature is written in a cursive, flowing style.

Krista M. Lee, Executive Director

/trm